Nos. 21982 and 21982A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STANFORD GOODMAN, doing business as LINDO ENGINEERING, also known as T. STANFORD GOODMAN, HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA to the use of JOHN P. RINEER, doing business as RINEER OIL SURFACING,

Appellee.

T. STANFORD GOODMAN, doing business as LINDO ENGINEERING, HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA to the use of TURLOCK ROCK COMPANY, a corporation,

Appellee.

Appeal from the United States District Court
For the Eastern District of California

APPELLEE'S BRIEF

MURPHY AND WARNISHER
Richard J. Murphy
1343 W. Valencia, Suite A
Fullerton, California

Attorneys for Appellee.
JOHN P. RINEER

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

TEXT BOOKS

Nos. 21982 and 21982A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STANFORD GOODMAN, doing business as LINDO ENGINEERING, also known as T. STANFORD GOODMAN, HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA to the use of JOHN P. RINEER, doing business as RINEER OIL SURFACING,

Appellee.

T. STANFORD GOODMAN, doing business as LINDO ENGINEERING, HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA to the use of TURLOCK ROCK COMPANY, a corporation,

Appellee.

Appeal from the United States District Court

For the Eastern District of California

APPELLEE'S BRIEF

Statement of the Case.

This is an appeal from a judgment of the Federal District Court for the Eastern District of California wherein Appellee Rineer sued Appellants Goodman and Hartford on bond under Miller Act, Title 40, §270(a)-(d), jurisdiction conferred under Title 28, §1352, for labor and materials, by virtue of breach of contract of guarantee that certain materials to be supplied by third party would be according to specifications.

Statement of Facts.

Prior to entering into a written contract scrivenered by Goodman and after the written proposal, Goodman and Rineer conferred on materials, Goodman advising that he was able to get a better price on sand and wanted to take advantage of the same, Rineer advising assent with the specification sand had to be in specification, assented to by Goodman. [Rep. Tr. P. 78, Lines 23-25 and P. 79, Lines 1-21; Rep. Tr. P. 153, Lines 22-25 and P. 154, Lines 1-24; Rep. Tr. P. 258, Lines 13-20]. The sand was not in specification. [Plaintiff's exhibit #2] [Rep. Tr. P. 42, Lines 18-25 and P. 43, Lines 1-3].

Summary of Argument.

I.

The sufficiency of Complaint, motion conforming pleadings to the evidence having been granted, cannot properly be raised on appeal.

II.

The trial court's findings cannot be set aside unless they are shown to be clearly erroneous.

III.

The trial court need not make a finding on every factical issue raised.

IV.

The asserted authorities of Appellant are clearly distinguishable or are not applicable to the case at hand.

V.

The trial court's findings of fact support the judgment as granted.

Argument.

I.

THE SUFFICIENCY OF COMPLAINT, MOTION CONFORMING PLEADINGS TO THE EVIDENCE HAVING BEEN GRANTED, CANNOT PROPERLY BE RAISED ON APPEAL.

In this matter, a motion for amendment of the pleadings to conform to the evidence was made [Tr. P. 63]. The same was granted [Tr. P. 98, Lines 30-31]. Such an amendment relates back to the date of the original pleadings under Rule 15(c), F.R.Civ.P., 28 U.S.C.A. This being the case, it is difficult to understand how the claim on the part of Appellants

raises an appealable issue, as there could be no prejudice and there were no objections to the admission of evidence on the grounds that the same were beyong the scope of the pleadings, and Rule 12(h), F.R.Civ.P., 28 U.S.C.A. indicates that Rule 15(b), F.R.Civ.P., 28 U.S.C.A. is the proper procedure to follow if objections or defenses are raised at the time of trial. In this case there were no objections to proceeding with trial and no objection was made to the motion to have pleadings conformed to the proof, and it is therefore respectfully concluded that there is no appealable issue with respect to the pleadings.

II.

THE TRIAL COURT'S FINDINGS CANNOT BE SET ASIDE UNLESS THEY ARE SHOWN TO BE CLEARLY ERRONEOUS.

The above stated rule has been codified in Rule 52(a), F.R.Civ.P., 28 U.S.C.A., wherein it is stated:

"...findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses..."

The trial court found that the Appellant and Appellee entered into an agreement for the supplying of labor and certain materials [Tr.P. 102, Lines 17-19], that by virtue of the said contract, labor and materials were supplied [Tr.P. 102, Lines 21-28], that the contract required the Appellee Rineer to obtain sand from Appellee Turlock Rock Company, and that the Appellant Goodman guaranteed the sand to be according to specification, and that the sand did not meet specification [Tr.P. 103, Lines 9-14].

With the exception of the attack by Appellant upon the finding that the Appellant Goodman guaranteed the sand would be according to specification, Appellants made no specification of error on these findings. With respect to the attack on the said finding, it is respectfully submitted that the testimony of Myron Hulett substantiates the guarantee aspect of the court's finding wherein [Rep. Tr. P. 153, Lines 22-25 and P. 154, Lines 1-24] it is stated:

"Q Will you tell us in substance what those conversations were?

A There were two items of discussion. One was the obtaining of the aggregate, the sand. I believe it was Jay Forrest who told us

-- well, he asked us, "Have you got a price on sand yet?" and we told him yes and he asked, "What kind of a price do you have?" and we told him $1.50 and tax at plant. He said, "Who is the supplier you got the price from?" and we said Turlock Rock. He said, "That's fine. We're buying other materials from Turlock Rock, but we believe we can do better than that and if we can do better than that, are you agreeable if we furnish the sand and we'll keep the difference in the cost what we have to pay and what you figure as your cost?", and it made no difference to us, so we said yes, that would be all right.

The other item of discussion was on the price we had quoted -- as I remember we quoted 21.5 cents a gallon on the oil that was to be spread and, golly, I don't know any other word to use except they jewed us down to 20 and a quarter cents a gallon.

And on the rock we had a certain figure per ton and that was taken care of by them furnishing the materials, so we had a negotiation after our proposal and before they drew up a contract and sent it to us.

In our conversation on the aggregate, they were going to furnish it, we asked that the protection be put in the contract for us, that the material had to meet specifications and they said they would do it that way."

and the testimony of John Rineer [Rep. Tr. P. 78, Lines 23-25 and P. 79, Lines 1-21] as follows:

"Q And what was said by Lindo Engineering concerning this?

A Well, I believe it was Jay Forrest that said that they wanted to put it in the contract that the sand be placed by Turlock Rock and that it would be a guaranteed price of $1.30, but --

Q Did you agree to that?

A We agreed to it as long as it was in spec and that's the way it's written in the contract.

Q What do you mean by "as long as it was in spec"?

A That it would meet Government specifications as far as applying it on the job.

Q Who was present at this last discussion you had?

A Jay Forrest and Mike Hulett and myself.

Q And where was that?

A At our office at 120 South Orange, Fullerton.

Q And approximately what date was it?

A It was prior to the signing of the contract, probably two or three weeks, something to that effect.

Q And did you advise them that you wanted this in the contract?

A Yes.

Q And they complied with that request?

A Yes."

and as verified by the Defendant, who was also the scrivener, as found in his testimony, [Rep.Tr.P. 258, Lines 13-20] as follows:

"A Yes; we had some discussion on that and I told him once again that the material had been submitted and that the material had been approved and that we had been quoted a price of $1.30 and he said, well, he'd gotten a price of a buck-fifty and I said, "Well, I'm certain they will sell it for $1.30 and I'll guarantee the price, that I'd guarantee that and he said, "Well, I want it according to specifications in the contract', so I did."

The special provisions of the written part of the contract are typewritten as opposed to printed [Pl. Exhibit Nos. 4 and 5].

And with respect to Appellant's assertion that the sand was according to specification, it is submitted:

1) specification itself was clear and concise [Pl. Exhibit No. 2]
2) there was testimony from the man who wrote the specification for the government stating that the sand was not in specification. [Rep.Tr.P. 42, Lines 14-25, P. 43, Lines 1-3] [Pl. Exhibit Nos. 4 and 5] [See Appendix P. 101].

It is therefore submitted that an issue of fact was resolved in favor of the plaintiff Appellee John P. Rineer on the finding of guarantee and there is ample support in the record for the trial court's finding.

III.

THE TRIAL COURT NEED NOT MAKE A FINDING ON EVERY FACTUAL ISSUE RAISED.

In Carr v. Yokohama Specie Bank, Limited, of San Francisco, C.A. Cal. 1953, 200 F.2d 251, it was held: in construing Rule 52, F.R.Civ.P.,

28 U.S.C.A. that the rule does not require the court to make findings on all facts presented or to make detailed evidenciary findings, but where findings were sufficient to support ultimate conclusion of court, they are sufficient, and it was not necessary for the court to make findings asserting the negative of each issue raised, but it was held sufficient if special affirmative facts found by the court construed as a whole negated each reviewed contention, and that the ultimate test as to the adequacy of findings is whether they are sufficiently comprehensive and pertain to issues so as to provide a basis for decision.

In Travelers Insurance Company v. Dunn, C.A.Tex. 1956, 228 F. 2d 629, the rule was stated that the findings of the trial court are to be liberally construed in support of the judgment.

In Weber v. McKee, C.A. Tex. 1954, 215 F.2d 447, it was again asserted in construing the said rule that the trial court need not make findings on all facts presented nor detailed evidenciary findings, nor assert the negative of each issue of fact raised, and that the ultimate test as to adequacy of findings is whether the findings are sufficiently comprehensive and pertain to issues so that as to provide a basis for decision. Clearly, in this case, the court felt that the Defendant Appellant Goodman, in guaranteeing the sand to be in specification, made moot the responsibility for selection.

IV.

THE ASSERTED AUTHORITIES OF APPELLANT ARE CLEARLY DISTINGUISHABLE OR ARE NOT APPLICABLE TO THE CASE AT HAND.

The cases of Jefferson Construction Co. vs. U. S. ex rel Bacon, 1st Circuit (1960) 283 F.2d 265, Cert. denied (1961) 365 U.S. 835 and Southern Painting vs. U.S. ex rel Silver, 10 Circuit (1955) 222 F.2d 431, are not applicable inasmuch as there was in fact a material breach of the contract before the court, as the court found that the defendant Goodman guaranteed the sand to be in specification, that it was in fact not in specification, and that this failure caused great difficulty.

The cases of De La Falaise vs. Gaumont Pictures (1940) 103 P. 2d 447, 39 Cal. App. 2d 461 and Lewis Publishing Co. vs. Henderson (1930) 284 P. 713, 103 Cal.App. 425 are not applicable inasmuch as there was no finding nor issue raised by the answer with respect to conditions

precedent, and, of course, a party defendant cannot use a condition precedent as a defense where he himself is the cause of the failure of the condition, for which assertion there is a wealth of authority, including: 12 Cal. Jur. 2d, Contracts, §232, citing Morrison v. Sycamore Canyon Gravel Company, 102 C.A. 536, 238 P. 84; Overton v. Vita-Food Corp., 94 C.A. 2d 367, 210 P. 2d 757; Richardson v. Walter Land Co., 118 C.A. 2d 459, 258 P. 2d 42; and 1 Witkin Summary, §271.

The cases of James vs. Haley, 212 Cal. 142, 297 P. 920 and Mason vs. Ennes, 172 Cal. App. 2d 99, 342 P. 2d 79, can be distinguished inasmuch as there was no material issue not covered by the findings in the case before the court, for the finding of guarantee and the breach of the same relieved Appellee Rineer of further duty and by negative reference refutes Appellants contention of Appellee Rineer's responsibility for selection.

V.

THE TRIAL COURT'S FINDINGS OF FACT SUPPORT THE JUDGMENT AS GRANTED.

There is no dispute as to the findings with respect to jurisdiction under the Miller Act. The finding that Appellant Goodman was the general contractor under the general contract, that the Appellant insurance carrier was the bonding company under bond required under the general contract, nor that a contract existed as between Appellant Goodman and Appellee Rineer, nor that materials and labor were furnished in accordance with the findings. There is ample evidence to support the court's finding that the Defendant Appellant guaranteed the sand to be in specification, that it was not in specification, and that great difficulty was created thereby. That is, a duty existed from the Appellants to the Appellee John P. Rineer, created by contract and by statutory authority. There was a breach of that duty by virtue of the Appellant Goodman's failure to make payment and the failure of his guarantee; that there was damage to the Appellee John P. Rineer by virtue of his having supplied materials and labor, and therefore, the Court was right and justified in granting judgment in favor of the Appellee John P. Rineer.

Conclusion.

The trial court's findings of fact were sufficient to support the

ultimate conclusion of the court and the judgment of the court was properly sufficient upon the findings as submitted, and this honorable court should affirm that judgment as entered.

Respectfully submitted,
MURPHY AND WARNISHER

By Richard J. Murphy

Attorneys for Plaintiff-Appellee
United States of America to the use of
John P. Rineer

Certification.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MURPHY AND WARNISHER

By Richard J. Murphy

APPENDIX

Direct examination of William Bruce:

" ***

Q Now, with respect to that specification, will you familiarize yourself with the specification concerning moisture content in the aggregate?

A Yes, sir.

Q From your own observation of the aggregate that you saw on the job, would you state whether or not the aggregate, as utilized, was within this specification?

MR. MARSH: May I object, your Honor, and ask that counsel to lay a better foundation as to time.

BY MR. MURPHY:

Q With respect to time of delivery on the job.

A When the material first was dumped on the job, it was, in our opinion, excessively wet and would not meet the requirement of the specification to be sufficiently dry to properly spread.

*** "